

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RAYMUND McDERMOTT and PHYLLIS
McDERMOTT, a married couple,

Plaintiffs,

v.

LIFE INVESTORS INSURANCE
COMPANY OF AMERICA, a Life Insurance
Entity,

Defendant.

Case No. C06-5344RBL

ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on opposing Motions for Summary Judgment. Plaintiffs Raymund and Phyllis McDermott seek a ruling as a matter of law that their claim is covered by Defendant Life Investors Insurance of America's (Life Investors) long-term insurance care policy. [Dkt. #29]. Defendant, Life Investors, moves for summary judgment seeking dismissal of plaintiffs' coverage claim. [Dkt. #34]. For reasons explained below, the Court **DENIES** the plaintiffs' motion [Dkt. #29] and **GRANTS** the defendant's motion [Dkt. #34].

FACTUAL BACKGROUND

On October 31, 2000, Mrs. McDermott was diagnosed with Mild Cognitive Impairment. Individuals with this impairment develop Alzheimer's Disease at a rate higher than that of the population at large. Mr. McDermott assumed the role of caregiver for his wife. As Mrs. McDermott's condition deteriorated, Mr. McDermott took her to Canterbury Gardens first for day care then for respite care, and

1 eventually for full-time residential care. Canterbury Gardens is a self-proclaimed “Alzheimer’s Special
2 Care Residence.” Exh. B to Plaintiff Decl. (Dkt. #32). Since June 14, 2005, Mrs. McDermott has been a
3 resident of Canterbury Gardens.

4 In 1997, the McDermotts purchased a long-term care insurance policy for Mrs. McDermott from
5 Bankers United Life Assurance Company, predecessor company to Life Investors. The policy applied for
6 was limited to Nursing Home Benefits. The McDermotts expressly rejected Home Health and Community
7 Rider Benefits which would have provided more expansive coverage, to include boarding homes, assisted
8 living facilities, and other community care facilities. Redacted Exh. A.1 to Weurdig Aff. at 2 (Dkt. #36).
9 The parties agree that Canterbury Gardens is licensed by the State of Washington as a boarding home and
10 is not a “nursing home” as that term is defined in the 1997 policy purchased by plaintiffs.

11 In 1999, Life Investors converted the McDermott policy to a tax qualified long-term care insurance
12 policy. The conversion was not accompanied by a change in premium and, according to defendant, was
13 not intended to expand benefits. The rider did, however, change the definition of “nursing home” to
14 include a reference to “Alzheimer’s Disease Facility.”¹ That additional reference gives rise to plaintiffs’
15 contention that Canterbury Gardens qualifies as a “nursing home” and that Mrs. McDermott’s care is
16 therefore covered under the 1999 policy.

17 The policy in question provides benefits/coverage for Basic Nursing Home Care, referred to in the
18 policy as “Nursing Home Basic Benefits.” The maximum benefit is \$100 per day with periodic escalators
19 built in at 5% annually. The insurer promises to “pay the actual charges incurred for each day you are
20 confined in a Nursing Home, up to the maximum Daily Benefit shown in the Schedule.” Exh. 3 to
21 Weurdig Aff. (Dkt. #34). The 1999 policy defines nursing home as:

22 A facility, or part of a facility which:

- 23 (1) is licensed by the state as a nursing home or an Alzheimer’s Disease facility; and
- 24 (2) is engaged in providing, in addition to room and board accommodations, nursing care and related services on a continuing inpatient basis; and
- 25 (3) provides, on a formal prearranged basis, a Nurse who is on duty or on call at all times; and
- 26 (4) has a planned program of policies and procedures developed with the advice of, and periodically reviewed by, at least one Physician; and

27
28 ¹Defendant contends that the reference to “Alzheimers Disease Facility” was inserted as an accommodation to those facilities meeting the definition of “nursing home” but which operate in states where facilities are licensed as Alzhemier Disease Facilities and not as “nursing homes.”

1 (5) maintains a clinical record of each patient.

2 Exh. 3 to Weurdig Aff. at 7 (Dkt. #34).

3 In early 2005, Mr. McDermott inquired in writing as to whether Canterbury Gardens met the
4 “Nursing Home” definition in the policy. In response to a prior verbal request from defendant’s claims
5 department, Mr. McDermott included a copy of Canterbury Gardens’ license to operate issued by the State
6 of Washington. Following a review of the policy, the facility license and relevant licensing regulations, Life
7 Investors informed Mr. McDermott that Canterbury Gardens did not qualify as a nursing home under the
8 1999 policy. Life Investors did refer Mr. McDermott to facilities nearby that would qualify as “nursing
9 homes” under the policy.

10 According to Life Investors, Canterbury Gardens does not qualify as a “nursing home” under the
11 policy for at least four reasons: (1) it is not licensed by the State of Washington as a nursing home; (2) it is
12 not licensed by the State of Washington as an Alzheimer’s Disease Facility; (3) it is not authorized by state
13 law to offer nursing care and related services “on a continuing inpatient basis;” and (4) it is licensed as a
14 “boarding home” which the policy definition of “nursing home” specifically excludes.

15 Notwithstanding its determination that Canterbury Gardens did not qualify as a “nursing home”
16 under the policy, in order “to resolve this disputed matter,” Life Investors agreed to pay for \$2,100 for 21
17 days of respite care at \$100 per day. The benefit was paid to plaintiffs, who did not waive any claim in
18 order to receive the payment. Life Investors informed plaintiffs that no further benefits would be paid
19 because Canterbury Gardens did not satisfy the requirements of the policy’s Nursing Home definition.
20 Exh. 17 to Weurdig Aff. (Dkt. #34). This lawsuit ensued.

21 Plaintiffs claim that the 1999 policy language, including reference to “Alzheimer Disease Facility”
22 renders the definition of “nursing home” ambiguous. They claim that their reasonable interpretation of the
23 policy language should be adopted by the Court and coverage thereby extended to Mrs. McDermott’s care
24 at Canterbury Gardens.

DISCUSSION

I. Summary Judgment

A. Summary Judgment Standard

Summary Judgment is appropriate “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party is entitled to summary judgment if, after satisfying its initial burden, the non-moving party fails to present specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). “The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words, summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable finder of fact could return a decision in the nonmoving party's favor. *Triton Energy*, 68 F.3d at 1220.

B. Interpretation of Insurance Contracts

Insurance policies are construed as contracts in Washington State. RCW 48.01.040 (defining insurance as “a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies”). The interpretation of insurance contracts is a question of law, *Weyerhaeuser Co. v. Aetna Cas. and Sur. Co.*, 123 Wash. 2d 891, 897 (1994), and the standard for interpretation is well settled:

In Washington, insurance policies are construed as contracts. An insurance policy is construed as a whole, with the policy being given a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” If the language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists. If the clause is ambiguous, however, extrinsic evidence of the intent of the parties may be relied upon to resolve the ambiguity. Any ambiguities remaining after examining applicable extrinsic evidence are resolved against the drafter-insurer and in favor of the insured. A clause is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.

Weyerhaeuser Co. v. Commercial Union Ins., 142 Wash. 2d 654, 665-66 (2000) (citations

omitted). In construing the insurance contract as a whole, the specific terms control generic terms. *See McGary v. Westlake Investors*, 99 Wash. 2d 280, 286 (1983); *Wash. Local Lodge 104 of the Int'l Bhd. of Boilermakers v. Int'l Bhd. of Boilermakers*, 28 Wash. 2d 536, 541 (1947); Restatement Second of Contracts, § 203(c). When there is ambiguity about the meaning of a policy term, parol evidence is admissible only to show the situation of the parties, not to modify or contradict the written contract's terms, except in cases involving fraud, accident, or mistake. *Berg v. Hudesman*, 115 Wash. 2d 657, 669 (1990).

1. The Definition of "Nursing Home" Under the Policy.

Plaintiffs contend they bought a long-term care insurance policy for Mrs. McDermott that by 1999 purported to cover care received at an Alzheimer's Disease Facility. The parties acknowledge that Mrs. McDermott has Alzheimer's and qualifies for benefits at a facility which meets certain policy requirements. The facility where Mrs. McDermott receives her care treats patients with Alzheimer's and other forms of dementia exclusively. Decl. of Cyndie Bryant, (Dkt. #30). Moreover, the parties agree that Washington only licenses nursing homes, boarding homes, and adult family care homes, and that all three types of facilities may provide dementia care. See RCW 18.20.320(1)(d) (boarding homes); Exh. D to Wolf Aff. at 14 (Dkt. #34); Exh. C to Ammons Decl. at 14 (Dkt. #39). Plaintiffs conclude that Canterbury Gardens qualifies as an Alzheimer's Disease Facility because it meets most, if not all, of the essential criteria established by the policy definition and to the extent it does not, the requirement is unreasonable and therefore unlawful and unenforceable.

Defendant acknowledges that Canterbury Gardens is licensed by the State and that it is authorized to care for Alzheimer patients/residents. It acknowledges that, unlike some licensed boarding homes, Canterbury Gardens has specific authority to lock doors and confine patients/residents who might be inclined to wander. Finally, defendant does not dispute that Canterbury Gardens has a nurse on duty 24 hours a day, seven days a week and that it maintains a clinical record of each person staying there. Nevertheless, defendant rejects any assertion that Canterbury Gardens meets the definition of "nursing home" under the 1999 policy.

Under Washington law, a facility licensed as a "boarding home" cannot provide nursing care to its residents on a continuous inpatient basis. Instead, intermittent care can be provided at a boarding home

1 under certain limited circumstances. RCW 18.20.020(7); 18.20.160. There is no dispute about this
2 significant point and it proves fatal to plaintiffs' claim.

3 The definition of "nursing home" has a licensing component deferring to the regulatory scheme of
4 each state. It also has a minimum services requirement that identifies all services that must be provided by
5 the health care provider to meet the policy definition requirements. Finally, the policy defines what is not a
6 "nursing home." The Court can certainly understand and sympathize with plaintiffs' confusion over the
7 apparent mismatch between what the policy allows and what the state provides by way of license
8 designation. While other states may have a specific license for Alzheimer's Disease Facility, Washington
9 does not. The Court also recognizes that Canterbury Gardens provides much more by way of services than
10 contemplated by state law descriptions of boarding homes and other facilities not qualified as licensed
11 nursing homes. See RCW 18.51.010. It provides an on-duty nurse and planned program of policies and
12 procedures which, if not developed with the advice of a Physician, is periodically reviewed by a Physician.
13 It also maintains a clinical record of each patient/resident. The Court cannot however, escape the clear
14 limitation imposed by law upon Canterbury Gardens' ability to provide continuous nursing care. The
15 policy definition for "nursing home" benefits requires the facility, no matter its license designation, to
16 provide continuous nursing care. By law, Canterbury Gardens cannot meet that requirement. Canterbury
17 Gardens cannot therefore fulfill the requirements of either a "nursing home" or Alzheimer's Disease
18 Facility as provided by the policy.

19 CONCLUSION

20 In 1997 the McDermotts bought insurance for long-term health care benefits provided at a "nursing
21 home." As of the date of purchase, the McDermotts clearly understood that a facility like Canterbury
22 Gardens was not a "nursing home" under the policy. While the 1999 modification may have created some
23 ambiguity concerning whether Canterbury Gardens was licensed by the State of Washington as an
24 Alzheimer's Disease Facility and although the services provided by Canterbury Gardens correspond to
25 some of the minimal requirements imposed by the subject policy, one essential qualification cannot be met.
26 Canterbury Gardens is prohibited by law from providing continuous inpatient nursing care. On that fact
27 there is no dispute. No reasonable interpretation of the policy can write the requirement out of the policy
28 nor can any reasonable interpretation of the facts satisfy the plain meaning of the policy language. The

1 continuous inpatient nursing requirement is not ambiguous, is not a gatekeeper provision, as that term is
2 used by plaintiffs, and more importantly, is not unreasonable.

3 The subject policy does not provide coverage for long-term or respite care provided at Canterbury
4 Gardens and defendant's motion for summary judgment [Dkt. #34] is **GRANTED**. Plaintiffs' motion for
5 summary judgment [Dkt. #29] is **DENIED**.

6 **IT IS SO ORDERED.**

7 Dated this 1st day of November, 2007.

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11 RONALD B. LEIGHTON
12 UNITED STATES DISTRICT JUDGE
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